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# Theodore Roosevelt and the Appointment of Mr. Justice Moody

*Paul T. Heffron\**

*The author here describes the events leading to the appointment of William Henry Moody to the United States Supreme Court. He recounts the pressures brought to bear on President Theodore Roosevelt and the considerations which led to the President's selection of Moody over Horace Harmon Lurton.*

On the evening of March 2, 1906, Henry Billings Brown, Associate Justice of the Supreme Court, celebrated his seventieth birthday by attending a dinner party at the home of Charles Henry Butler, Court reporter. The very next morning Justice Brown went to the White House and informed President Roosevelt that he would retire at the end of the term. In his conversation with the President, Brown ventured to suggest that Secretary of War Taft be appointed to his place. To this Roosevelt replied that Taft was presidential timber and hence not available. Brown then put forward the name of Philander C. Knox, Senator from Pennsylvania, but lately Roosevelt's Attorney-General. While he did not record Roosevelt's reaction to his second suggestion, subsequent events would reveal that the President's thoughts ran in the same channel.<sup>1</sup>

Theodore Roosevelt was thus presented with his third opportunity to name an Associate Justice of the Supreme Court.<sup>2</sup> It should be recognized at the outset that the appointment of able and progressive federal judges was a duty second to none in Roosevelt's hierarchy of values.<sup>3</sup> He was especially concerned with the Supreme Court, which at the moment could scarcely be considered either a strong or liberal bench.<sup>4</sup> Time and again he reiterated what he wanted in a justice

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1. KENT, MEMOIR OF HENRY BILLINGS BROWN 32-33 (1915). Upon ascending the Federal bench as a District Judge thirty years before, Brown had vowed he would not serve beyond the age of seventy. He had been appointed to the Supreme Court by President Harrison in 1890 to replace Justice Miller.

2. Roosevelt had appointed Oliver Wendell Holmes, Jr., in 1902 and William Rufus Day in 1903. For the circumstances of Holme's appointment to the United States Supreme Court, see 22 NEW ENG. Q. 291-303 (1949).

3. For an example of Roosevelt's great care in getting the right man on the lower federal bench, see Morison, *Theodore Roosevelt Appoints a Judge*, 72 PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY. 309-22 (1963).

4. The Supreme Court at this time consisted of Chief Justice Fuller and Justices Harlan, Brewer, Brown, Peckham, White, McKenna, Holmes, and Day. Justice Brown's

of that Court. A justice of the "greatest Court in Christendom," must be not only a great lawyer, but also a great constructive statesman who would construe the national commerce power in the spacious manner of John Marshall. Acutely aware that over the next two decades the Court would be called upon to decide the constitutionality of much far reaching social legislation, Roosevelt was intellectually committed to the appointment of men possessed of the "right" economic and social philosophy; that is, judges who believed that both state and nation had the constitutional power to bring under social control the powerful and aggressive forces of industrial enterprise. Moreover, in the context of 1906, he was looking for a man with liberal views on the question of Negro voting rights and on the reach of federal power over the new insular possessions.<sup>5</sup>

It was with these very clear and specific criteria, then, that Roosevelt set about to find a successor to Justice Brown. In the end he would appoint his own Attorney-General, William Henry Moody. Moody's appointment, however, although a natural one in retrospect, since he had all of the qualifications, came only at the tail end of a series of somewhat intricate backstage transactions extending over a period of eight months. Intimately involved in the decisional process but on opposite sides were two of the President's closest friends and advisers, William Howard Taft and Henry Cabot Lodge. Moody himself was in the delicate position of a middleman. Fortunately a substantial amount of manuscript material pertaining to this episode has been preserved. It is thus possible to show the interplay of the many factors, the pressures and crosscurrents, which frequently lie behind a high level presidential appointment. Indeed, the full story of how Roosevelt came to a final decision in the fall of 1906 constitutes an illuminating case study of the "politics"—in the broadest sense of the term—of one Supreme Court appointment.

The President's response to the news conveyed by Justice Brown was swift. It would appear that he concluded in his own mind to appoint Knox. Before proceeding further, however, he called in Secretary of State Elihu Root, Secretary of War Taft, and Attorney-General Moody, the three men on whom he relied most heavily

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work had been impaired for several years due to failing eyesight. Chief Justice Fuller and Justice Harlan were 73; Justices Brewer and Peckham were 68, and both in declining health.

5. Roosevelt's views on the Supreme Court can be found in his correspondence with Taft and Lodge before and during this period. See particularly Letter From Theodore Roosevelt to Henry Cabot Lodge, July 10, 1902, 1 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE 518 (1925); for public statements see his address given at a banquet for Justice Harlan, December 9, 1902, 1 PRESIDENTIAL ADDRESSES AND STATE PAPERS 221 (1910), and that at Justice Brown's retirement dinner on May 31, 1906, Washington Post, June 1, 1906.

during his administrations for advice on matters large and small. When told of the vacancy, all three unhesitatingly urged the appointment of Knox.<sup>6</sup> Roosevelt then directed his private secretary, William Loeb, to contact Knox at once. Loeb immediately dispatched a note requesting Knox to come over right away, if possible, or if not, at ten that evening.<sup>7</sup> Knox was located at four o'clock attending a matinee at Washington's Belasco Theatre, and the message given to him in hand. He left the performance and went straight to the White House where the President tendered him the place to be left by Brown's retirement. Knox promptly declined, noting that the President offered him the seat "before considering anyone else."<sup>8</sup>

For nearly a week there was no public announcement of Justice Brown's retirement. Although it would not turn out that way, it was obviously Roosevelt's desire to render an early decision, thereby heading off the inevitable pressure of claimants for the high post. By March 9, however, the press was reporting the approaching vacancy on the Court and also Knox's refusal of the President's offer.<sup>9</sup> Somewhat disconcerted by the rumors and press speculation, Pennsylvania's Governor, Samuel W. Pennypacker, wrote to Knox to confirm the story and also to encourage his acceptance if the seat was offered. "Pennsylvania ought to have the appointment," he told Knox, "and it is doubtful whether any other selection could be made and would in every respect be so eminently fitting—and promise so much for the Court and for this Commonwealth."<sup>10</sup>

Knox promptly confirmed the report and informed Pennypacker of his reasons for declining. He felt "that in view of the very handsome way in which your selection of me to fill Senator Quay's place was approved by the people of Pennsylvania, and the uncontested election which followed, I owed the State more service as Senator, and I feel that I owe the party exemptions from the strains which might come in endeavoring to elect a successor." Knox then concluded with a tantalizing statement relative to the President's

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6. WAR SECRETARY DIARIES, March 10, 1906, Taft MSS, Library of Congress [hereafter cited as DIARIES].

7. Letter From William Loeb to Philander Knox, March 3, 1906, Knox MSS, Library of Congress.

8. *Ibid.* Knox made this terse note in his own hand and without further explanation at the bottom of Loeb's letter.

9. N.Y. Daily Tribune, March 9, 1906. The *Tribune* maintained that this was the third time Knox had been offered a seat on the Court; first in 1902, when Justice Shiras resigned and later when Justice Harlan allegedly offered to retire if Knox would agree to replace him. It is certain Roosevelt considered Knox in 1902 when Taft refused an appointment to stay in the Philippines. See Letter From Theodore Roosevelt to William H. Taft, November 26, 1902, Taft MSS. Taft as President offered the Court to Knox, then Secretary of State, and he again declined. See Letter From Taft to Knox, November 29, 1911, Knox MSS.

10. Letter From Samuel Pennypacker to Knox, March 9, 1906, Knox MSS.

intentions: "At the time of my talk with the President on March 3rd, as soon as I told him that it would be impossible for me to accept, he made known to me his intentions in the matter which will be carried out without doubt."<sup>11</sup>

Frustrated in his first choice, the President continued to ponder Brown's replacement behind the scenes. In the meantime considerable public interest in the Supreme Court as an institution as well as in the immediate appointment was reflected in the daily press. The *New York Times* was especially agitated. Suggesting that a reorganization of the Court was in the offing and that President Roosevelt had plans for enlarging it to eleven members, it went on, naively, to recoil from the thought that a President would make agreement with his policies a prerequisite for a seat on the bench.<sup>12</sup> On the other hand, its rival *The Tribune*, approached the subject somewhat more dispassionately. It was concerned that in appointing a successor to Justice Brown the President would attempt to equalize the representatives on the Court, of the various federal circuits. Both the Third and Fourth Circuits, it was pointed out, were without representation—the Fourth had been unrepresented since the death of Chief Justice Taney in 1864. By the same token, the Sixth Circuit was over-represented, having three men on the Court. *The Tribune* was quite confident that the new justice would come from the Third Circuit.<sup>13</sup>

Speculation as to Brown's successor centered almost exclusively on Taft. It was generally understood that the seat was his if he wished it. Moreover, if Chief Justice Fuller should retire before Roosevelt left office, Taft would unquestionably be placed at the head of the Court.<sup>14</sup> Soon the story circulated that Taft had accepted an appointment. Justice Holmes hastened to welcome him warmly to the Court: "I hoped above all things that the place would be offered to you, and that you would accept, and I am full of joy that it has come to pass."<sup>15</sup> Two days later the genial Chief Justice believing that Taft was to join the Court sought to remove any indecision: "I cannot but think that the real good of the country demands your acceptance."<sup>16</sup> But the fact was Taft had not accepted.

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11. Letter From Knox to Pennypacker, March 11, 1906, *id.*

12. *N.Y. Times*, March 10, 1906.

13. *N.Y. Daily Tribune*, March 11, 1906.

14. *Brooklyn Daily Eagle*, March 12, 1906; *Kansas City Journal*, March 15, 1906; *Newark Evening News*, March 13, 1906; *N.Y. Daily Tribune*, March 10, 1906; *N.Y. Times*, March 11, 1906; *Washington Evening Star*, March 10, 13, 1906.

15. Letter From Oliver W. Holmes to Taft, March 10, 1906, Taft MSS.

16. Letter From Chief Justice Fuller to Taft, March 12, 1906, *id.* The Chief Justice may well have been implying that he did not intend to retire. Efforts to induce Fuller's retirement at this time were little short of indecent. He was very much in

Having failed to persuade Knox, Roosevelt had indeed turned directly to Taft. For the third time in his Presidency he gave him the chance to fulfill a lifelong ambition. The story of Taft's refusal to leave his work in the Philippines in 1902 and 1903 is too well known to need retelling.<sup>17</sup> His sincere devotion to duty had prevailed over his personal preference. There had also been family pressure not to remove himself from the political scene so early in life. The political factor would be even stronger in 1906, for by this time he was a candidate for the presidential nomination in 1908; a reluctant candidate as his biographer says, but a candidate nonetheless.

Once again in his public life Taft faced the agony of decision as to his future. It began soon after Knox's refusal.<sup>18</sup> Responding in the negative to Roosevelt's offer of an Associate Justiceship, Taft told him that he simply preferred to continue his work in the War Department; that he wished especially to advance the work in connection with the Philippines and Panama. At the same time he made it clear to the President that he much preferred a judicial to a political career and if the Chief Justiceship was open, there would be no problem. Roosevelt satisfied for the moment with Taft's decision to wait, began to canvass other names for the vacancy.<sup>19</sup>

None of the suggested candidates seemed to appeal to the President. A few days after his conversation with Roosevelt, Taft was invited to lunch by Root and Moody, supposedly he thought to discuss the railroad rate legislation then before Congress. His Cabinet colleagues, however, perhaps at Roosevelt's suggestion, talked exclusively about the Supreme Court. They discussed a number of candidates and finally, as Taft recorded the conversation, Moody said to Root: "Well, now, suppose we say to him what we had him

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touch with his environment and determined as he told Justice Holmes, "not to be paraphrased out of his place." See KING, MELVILLE WESTON FULLER 237-47 (1950).

17. See PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 237-47 (1939).

18. There is a discrepancy as to the precise time that Taft was offered the appointment. His friend John Hays Hammond says Taft received the offer over the telephone while he and Mrs. Taft were visiting at his home in New Jersey. The occasion was the Hammonds' twenty-fifth wedding anniversary, which would have been January 1, 1906. But there was no vacancy at this time. Either Hammond's memory was wrong or the President talked about a possible vacancy to Taft. See HAMMOND, 2 THE AUTOBIOGRAPHY OF JOHN HAYS HAMMOND 532-33 (1935). There is nothing to substantiate Hammond's account in the Taft papers, although Pringle repeats it.

19. DIARIES, March 10, 1906. The many private discussions which followed Knox's interview with the President were recorded by Taft in a confidential memorandum. It was understood that if Taft went on the Court and the Chief Justiceship became vacant before the end of Roosevelt's term, he would be promoted. Other names mentioned for the vacancy were federal judges George Gray of Delaware, and Willis Van Devanter of Wyoming.

here for and then they proposed that I take it."<sup>20</sup>

Taft did not go along with their thinking for the same reason he had given the President. One can be reasonably sure that Root and Moody informed their chief that Taft was standing firm. After a subsequent Cabinet meeting, the President asked Root, Taft, and Secretary of the Treasury George B. Cortelyou to remain. There was an inconclusive review of other available men. But the President, agreeing that another Court vacancy in his term was likely, did not press Taft.<sup>21</sup>

Roosevelt's mind, however, was not at ease with this conclusion. His anxiety over the problem was increased after a talk with Senator Lodge. Lodge warned him that it was unsafe to await another vacancy; that despite the age of several members of the Court, their retirement might be delayed until Roosevelt's last year and if there should be a Democratic President, "as there was likely to be," a Democratic minority in the Senate would filibuster and prevent any nomination.<sup>22</sup>

Lodge's arguments weighed heavily with Roosevelt, and Taft feared he would be put into a position from which there was no escape. At this juncture he adopted delaying tactics. On March 8, assuring the President that he would go on the Court if it was put to him squarely on the basis of public duty, he requested that Roosevelt not make a final decision until he could consult with his three brothers. He also told the President, for the first time, that Mrs. Taft was so bitterly opposed to his taking a judicial position that she had phoned him that morning saying it would be the biggest mistake of his life.<sup>23</sup> Roosevelt readily consented to wait.

The following week was one of decision for the Taft family. Horace, Henry, and Charles Taft rendezvoused in New York City, planning a dinner for Will on the 15th. Nellie for her part, secured an interview with the President for the same day. Taft's embarrassment at this move is reflected in a long and confidential letter to Roosevelt, written as a basis for his coming conversation with Mrs. Taft. He was sure that the President would bear with her exaggerated ideas of his indispensable qualities and sympathize with her hurt pride "at my taking a position at the bottom of nine when she thinks

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20. *Ibid.* There is some ambiguity about Root's position. Taft's memorandum later records that Root was opposed because Taft was in the running for 1908. Apparently Root's opinion fluctuated, but on the 14th Taft repeated that Root and Moody wanted him to go on the Court, and had urged him a second time. Letter From Taft to Roosevelt, March 14, 1906, Roosevelt MSS, Library of Congress.

21. *Ibid.* The possible vacancies discussed involved the Chief Justice and Justices Harlan, Brewer, and Peckham.

22. *Ibid.*

23. *Ibid.*

that the one at the top is none too good." Taft again reviewed his reasons for not wanting to go on the Court now, still making it clear, however, that if the President felt that the reasons for going on the Court outweighed those for staying in the War Department, he would consent.<sup>24</sup>

He then joined his brothers in New York.<sup>25</sup> They were not quite unanimous. Charles tended to favor the Court and was not persuaded that a seat on the bench necessarily put his brother out of the 1908 presidential race.<sup>26</sup> But the general consensus was the same as three years previous; Will should not yet withdraw from the mainstream of political life.

There is no account of Mrs. Taft's conversation with the President. Her position of course was inflexible. She was resolutely determined to see her husband in the White House two years hence. From this half-hour's talk with her and from one phrase in Taft's letter, Roosevelt drew the conclusion that he had been in error as to Taft's real preference:

You say that it is your decided personal preference to continue your present work. This I had not understood. On the contrary I gathered that what you really wanted to do was to go on the bench, and that my urging was in the line of your indication, but in a matter in which you were in doubt as to your duty.

What you say in your letter and what your dear wife says alters the case.<sup>27</sup>

In the light of this new understanding, the President did not choose to put the Court offer on the basis of duty. Rather, he placed the burden of the decision on Taft himself: "My dear Will, it is pre-eminently a matter in which no other man can take the responsibility of deciding for you . . . No one can with wisdom advise you."<sup>28</sup> Roosevelt, however, spared him an immediate decision. On March 17, Loeb announced that the Court matter would go over until fall.<sup>29</sup>

Postponement was a convenient expedient for Taft. The actual vacancy would not exist until the Court convened in October. Meanwhile the Chief Justiceship might open up in which case the decision would be made for him. But at this point his own sincere feeling for the work of the War Department, his reluctance to take less than the

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24. Letter From Taft to Roosevelt, March 14, 1906, Roosevelt MSS.

25. A family gathering to help chart Taft's public life was nothing new. In January 1903 a similar family conference had taken place although Taft himself was in the Philippines. See PRINGLE, 1 TAFT, 237-38.

26. DIARIES, March 12, 1906.

27. Letter From Roosevelt to Taft, March 15, 1906. This letter is printed in MORISON, 5 THE LETTERS OF THEODORE ROOSEVELT 183-86 (1952).

28. *Ibid.*

29. N.Y. Times, March 17, 1906.



Chief Justiceship, and the strong family pressure stemming from his likely candidacy in 1908, virtually precluded his going on the Court as an Associate Justice.

Talk of the Supreme Court vacancy now receded, but the silence was deceptive. For if Taft had concluded in his own mind not to fill the Brown vacancy, he was anything but disinterested in whom the appointee might be.

In this connection it is necessary to backtrack briefly. Between March 3 and 10, it has been noted that Taft "canvassed" other names with the President. Also during this interval, the President, solicitous that any appointment be acceptable to the Court itself, had consulted individually with Chief Justice Fuller, and Justices Harlan, Day, Brewer and White. It is apparent, also, that Roosevelt was sounding out the Justices as to possible retirements. Taft was obviously acceptable to the Court; later information would reveal that the Justices held definite opinions of other candidates. But the substance of their conversations with the President at this time is not clear. What is certain, however, is that Taft himself had three candidates, namely: Lloyd Bowers, Henry M. Hoyt, and Horace H. Lurton.<sup>30</sup> Both Bowers and Hoyt were old friends from Yale days, while Lurton was a former colleague of Taft's on the Sixth Circuit Court of Appeals. Bowers was presently General Counsel for the Chicago and Northwestern Railway Company, Hoyt was Solicitor General of the United States, and Lurton still sat on the Sixth Circuit. Taft was determined that one of these three should be his alternate.

As events progressed, it became clear that neither Bowers nor Hoyt had a real chance. Taft was frank to tell Hoyt that the Court itself was not favorable to his appointment,<sup>31</sup> while Bower's corporate connections eliminated him.<sup>32</sup> Lurton was another story.

Sixty-two years of age, Horace Harmon Lurton was a man in search of a place. That place was the Supreme Court of the United States. A gentleman of the old school, Lurton had an interesting and colorful background. Born in Kentucky he had entered the Confederate army at seventeen, spending over a year in a Northern prison camp. After the war he settled in Tennessee eventually becoming Chief Justice of the State Supreme Court. President Cleve-

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30. DIARIES, March 10, 1906.

31. Letter From Taft to Henry Hoyt, DIARIES, June 24, 1906. Taft gave no reason for the Court's attitude toward Hoyt. Actually he was Knox's candidate.

32. Roosevelt had considered Bowers for the Court at least briefly in 1902. Bowers was actively seeking the Court now, writing to Taft on March 8: "if I am seriously considered at any time and you think any effort in my behalf is desirable, it will be well, I believe, for you to speak to Senator Spooner and also to Senator Kittridge; both of them being members of the judiciary committee of the senate, and both, I think, my sincere friends." Taft MSS.

land appointed him to the Sixth Circuit Court of Appeals in 1893 where he became presiding judge upon the resignation of Taft. In addition to his judicial duties, Lurton had been lecturing at the Vanderbilt Law School since 1898; presently he was doubling as Dean.<sup>33</sup>

Few aspirants for the Supreme Court have had so many friends in influential positions. In addition to Taft, at least three members of the Court itself would actively support Lurton. Taft had long been a friend and admirer of Judge Lurton. A spirit of camaraderie had developed between the two men during their service on the Sixth Circuit. Taft had even suggested Lurton for the Court in 1903.<sup>34</sup> Now he was in a position to make his weight count more heavily. His campaign got underway at the moment Loeb announced the postponement in filling the Court vacancy. On March 19 he confided to a former Tennessee law associate of Lurton that: "No man's appointment to the bench would give me greater pleasure than that of Judge Lurton's and I think he knows it."<sup>35</sup> A steady correspondence soon developed between Taft and his old friend. On April 8 Lurton congratulated the Secretary of War on a recent speech at Tuskegee. Their views on the Negro problem coincided. The Negro must ultimately be given his right to vote; but patience was needed.<sup>36</sup> Taft replied that he was "anxious" to see him during the summer.<sup>37</sup>

Lurton was in no doubt as to Taft's anxiety; his own anxiety was much greater. Keeping him informed of his whereabouts, he found it convenient to "pass through" Washington at the end of May.<sup>38</sup> Their luncheon conversation is not recorded but it may be safely assumed that Lurton was reassured of Taft's support should he conclude absolutely to remove himself from consideration. This he had not done. As late as May 15 he was writing confidentially to his friend Benito Legarda in the Philippines that he might go on the Supreme Court.<sup>39</sup> And on June 9, the *Baltimore Sun* was predicting on the "highest authority" that Taft would choose the judiciary after all.

So the matter remained unresolved going into the summer of 1906. The President gave some thought to it during June. Brooks Adams, ever ready to offer advice, reminded him that: "The weakest

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33. Frierson, *Horace Harmon Lurton*, in 11 *DICTIONARY OF AMERICAN BIOGRAPHY* 509-10 (1928).

34. DUFFY, *WILLIAM HOWARD TAFT* 156-57 (1932).

35. Letter From Taft to A. G. Goodlett, March 19, 1906, Taft MSS.

36. Letter From Judge Horace Lurton to Taft, April 8, 1906, *id.*

37. Letter From Taft to Lurton, April 9, 1906, *id.*

38. *DIARIES*, May 29, 1906.

39. Letter From Taft to Benito Legarda, May 15, 1906, *DIARIES*.

spot is the Court. The monopolists control there now, and must keep control or go under. . . . I sincerely hope to see Taft soon on the bench."<sup>40</sup> Roosevelt carried the problem with him to Oyster Bay. All would have been simpler save for 1908. As he confided to Benjamin Ide Wheeler, President of the University of California,

I hate to have Taft go on the bench, great though I think his usefulness there would be, because just at the moment I am puzzled to see what other leader is developing for the nomination: which of course under no circumstances would I take; and we are going to need to put our best foot forward to beat Bryan.<sup>41</sup>

° Roosevelt was at Oyster Bay for a full three months; all of the time in the throes of indecision. By mid-July Judge Lurton was a serious, if not the leading candidate. He wanted to be satisfied, however, that Lurton held the right views on the important social issues of the day. Accordingly, he proceeded to try him out on the Negro question. On June 19, William H. Fleming, former Georgia Congressman, had spoken to the Alumni Association of the University of Georgia, on Negro suffrage. His condemnation of a proposed educational test for Negroes coupled with his insistence that the races must live together in harmony, appealed to Roosevelt.<sup>42</sup> He sent a copy of Fleming's speech to Lurton with the request "to tell me what you think of it."<sup>43</sup>

Lurton replied at some length. After praising the high moral tone of the address he gave his view of the so-called "grandfather clause:"

I am glad he spoke out so plainly in reference to the "grandfather" clause in one or two of our state constitutions. As a lecturer upon constitutional law, I have been warning my law students of the "Vanderbilt" of the crookedness of that device and the inevitable result, when the question is made in such a way as to compel a decision by the Supreme Court. I am glad that in Tennessee, public opinion has never sanctioned any such device.<sup>44</sup>

Lurton passed the test with this letter. A week after receiving his answer Roosevelt informed Taft, who by now had decided definitely to stay in the Cabinet, of his present feeling for Lurton:

While I do not wish to definitely commit myself, my belief is that I shall appoint Lurton. I know that he is right about labor, right about trusts,

40. Letter From Brooks Adams to Roosevelt, June 11, 1906, Roosevelt MSS.

41. Letter From Roosevelt to Benjamin Wheeler, July 3, 1906, *id.*

42. Fleming's address was reported in the *Atlanta Constitution*, June 20, 1906. The complete speech was not excessively liberal. Fleming found no fault with the poll tax or the white primary.

43. Letter From Roosevelt to Lurton, July 18, 1906, Roosevelt MSS.

44. Letter From Lurton to Roosevelt, July 23, 1906, *id.*

right about our foreign policy, and that he is a man of national instincts. I purposely sent him Fleming's address on the negro, to find out if he is right about the negro too, and he is.<sup>45</sup>

Taft had anticipated the President. From his summer home in Murray Bay, Quebec, he had already dispatched written instructions for Lurton's guidance. "I want you to reach Day and White at once and have them press on the President the great wisdom of your appointment in case I am not to be taken to succeed Brown." Taft was even more specific, indicating what points the Justices should emphasize. They were to dwell on the great satisfaction Lurton's appointment would give the bar and the people, first, for recognizing high judicial talent, and secondly, as evidence of how lightly partisan ties bound the President in his great appointments to the bench. Moreover, time was of the essence. "The iron is hot and I have done some of the heating."<sup>46</sup>

Lurton needed no prodding. Writing first to Day and conveying Taft's message he suggested that he "use the wire rather than the mails. This I think is my chance and my last one."<sup>47</sup> Sensing that the great prize was within his grasp, Lurton indulged in humble self-scrutiny to Taft:

Do you know that with your influence thrown in my favor, I begin to tremble over the responsibility likely to result from your action. It is true that all my life I have entertained the ambition to go at last upon the one great court of the earth. Now that it looks as if it might be realized, I wonder, and wonder if I can bear myself worthily of the great post.<sup>48</sup>

Justice Day received Lurton's letter while vacationing at Mackinac Island. His response was swift. Day strongly recommended Lurton to the President in a letter which followed the lines laid down by Taft.

In the event of Judge Taft's declination of the place, I hope you can see your way to the appointment of Justice Lurton of Tennessee. I know him to be pre-eminently qualified for the duties of the place. He could take hold from the start of his full share of the work of the Court and do his part with great credit and to the satisfaction of the country, bar and litigants. May I say that a man of experience and immediate capacity for usefulness is needed. Judge Lurton has wide judicial experience, Federal and state, untiring industry and will continue to be a safe and sound Judge. I believe his appointment will reflect honor upon your administration and be to you

45. Letter From Roosevelt to Taft, August 3, 1906, *id.* The President gave no indication of how he had ascertained Lurton's views on the other questions.

46. Taft's letter is quoted verbatim by Lurton in a letter to Justice Day, July 22, 1906, Day MSS, Library of Congress.

47. Letter From Lurton to Day, July 22, 1906. *id.*

48. Letter From Lurton to Taft, July 23, 1906, Taft MSS. Taft had informed Lurton of his decision not to go on the Court on July 19.

a source of satisfaction.

On thus addressing you, I believe I am primarily influenced by the consideration of the usefulness and influence of the Court for the country's good. This appointment would in my opinion, best fulfill the requirements of the situation from every point of view. It could not fail of accomplishing the purpose of giving to the country a wise, upright and faithful judge on the court of last appeal.

I know how dear to your heart this duty lies, and activated by my own interests in the work and influence of the Court, I have said this word of perhaps unnecessary suggestion.<sup>49</sup>

Roosevelt gave encouragement to Day, replying that he was very much inclined to appoint Lurton, "although I do not wish to definitely commit myself as yet." Perhaps it was with tongue in cheek that he further remarked: "Curiously enough, Taft had spoken of Judge Lurton exactly in the same way."<sup>50</sup>

While the President's letters to Taft and Day give the impression that Lurton was his first choice and that he was on the verge of appointing him, there is other evidence which suggests that it was Attorney-General Moody whom Roosevelt really wanted. Before continuing to trace the chain of events, a short profile of the man now preoccupying the President's mind, is in order.

William Henry Moody of Massachusetts, was one of the most significant but lesser known public men of the Roosevelt Era. He had entered the stage of national politics during the McKinley administration, serving seven years in the House of Representatives. Prior to this he had established himself as a leading member of the Essex County bar, receiving statewide and even national prominence in 1893 as one of the Commonwealth's prosecuting attorneys in the famous Lizzie Borden murder trial. A graduate of Harvard, class of 1876, Moody received his legal education in the Boston law office of Richard Henry Dana. He had become friendly with Roosevelt when the latter was Assistant Secretary of the Navy and the two men shared similar views on the importance of naval power. In May 1902, Roosevelt brought Moody into his Cabinet as Secretary of the Navy, an office in which he displayed unusual talents for administrative organization. When Knox went into the Senate in 1904 Roosevelt moved Moody into the Attorney-Generalship.

He was made for this office. A trial lawyer par excellence, Moody had gone on to compile a remarkable record of anti-trust prosecutions. At this time he was in the midst of important suits against such powerful combinations as the Beef Trust, the American Sugar Refining Company, and Standard Oil. He was also in the thick of the

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49. Letter From Day to Roosevelt, July 23, 1906, Roosevelt MSS.

50. Letter From Roosevelt to Day, July 25, 1906, *id.*

railroad rate fight. Fifty-two years of age, at the height of his legal powers, both politically and socially close to Root, Taft, Lodge, and Roosevelt himself, Moody was a man no President was likely to overlook. Yet he had made definite plans to return to his Boston law firm not later than the end of the year and did not consider himself a candidate for the Brown vacancy.<sup>51</sup>

That Roosevelt was thinking of Moody for the Court was first revealed in a letter to his former Secretary of the Navy, Paul Morton. Morton had spoken for Moody in case Taft declined. "He has the right conscience and material for a great judge," he wrote Roosevelt, "and you know he will never disappoint you or the people."<sup>52</sup> The President admitted that he had been "thinking this over and over myself," but was sorry to say, "after sounding out the different people, that just at this time it would not do to put a second Massachusetts man on the Supreme Court bench."<sup>53</sup>

On the day that Roosevelt seemingly ruled out Moody on geographical grounds, Taft sent him another long letter from Murray Bay. The content of this letter implies that Moody was the President's first choice. Taft realizing this set about to change his mind in favor of Lurton. While he could say nothing but good about Moody, he thought it would be wiser to appoint Lurton, hinting at opposition to Moody's nomination:

You would like to appoint Moody, and Moody would make an excellent Justice and ultimately would be confirmed, but I fear it would cause a good deal of discussion that might be avoided if an opportunity arose later in the administration as it is likely to. I am very fond of Moody. He is lovable and has such pleasing modesty and is withal so loyal and able. But I must give you my unbiased judgment. He would be right on all the great questions and would doubtless develop greater strength of decision in the independent position on the Bench, than he is credited with in an administration position. His mind is judicial and his thoughts run clear and with great common sense.

My own judgment is that in spite of all that can be truly said in favor of Moody, it would be wiser now to appoint Lurton. Lurton is beyond dispute the ablest circuit judge on the bench. . . . His appointment would be hailed by the country as an evidence of your non-partisan desire to elevate and strengthen the Supreme Court. . . . He is a Democrat, but the Republicans of Tennessee will welcome the appointment.<sup>54</sup>

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51. The biographical material on Moody has been gathered from several sources by the author, including interviews with people who knew Moody personally. See also Sisson, *William Henry Moody*, 13 *DICTIONARY OF AMERICAN BIOGRAPHY* 107-08 (1928); Wiener, *The Life and Judicial Career of William Henry Moody*, 1931 (unpublished thesis).

52. Letter From Paul Morton to Roosevelt, July 17, 1906, Roosevelt MSS.

53. Letter From Roosevelt to Paul Morton, July 30, 1906, *id.*

54. Letter From Taft to Roosevelt, July 30, 1906. *id.*

Taft concluded by disposing of an objection to Lurton raised by Justice Brewer:

One personal consideration I ought to mention—Brewer told you the appointment of Lurton would make any appointment from the same circuit impossible. I think this unfounded because Lurton's appointment will be taken as from the South. But however this may be, it ought not to prevent the appointment of the best man and one who has earned it.<sup>55</sup>

Thus the President's position was one of the man caught on the horns of a dilemma. He was completely sure of Moody's legal ability and his philosophy of federal power; in addition he had been a loyal member of the administration for nearly five years and Roosevelt found him a delightful social companion. On the other hand he had allowed Taft to dominate the situation to such an extent that he was giving him every reason to suppose that he would appoint the man who had "earned it" and whose judicial philosophy he was accepting as "right" solely, one suspects, on his testimony. For a moment Roosevelt had thought he saw a way out. His strategy provides an interesting side light to the story and also reinforces the conclusion that he had been considering Moody for some time.

Plainly stated, his idea was to get Justice Harlan off the Court thus making two vacancies. Harlan was approaching seventy-four and had been on the Court for thirty years. To encourage his retirement Roosevelt proposed to appoint his son James to the Interstate Commerce Commission, recently increased to seven members. He had written to Harlan in June informing him of his intention and pointing out what he felt was an obstacle; in his capacity as a Justice the father would be passing on rulings made by his son as a member of the Commission.<sup>56</sup> But Harlan easily saw through such a transparent scheme and rejected it with hurt feelings. He reminded the President that he had previously considered his son for a federal judgeship in Chicago and had not raised the question of conflicting interests: "The obstacle which apparently stands in his way might, perhaps, be removed, so far as the objections are concerned, by my announcement . . . on a named day, or in the near future, to retire from the Bench." This he would never do: "my self respect to speak of no other aspect of the matter, forbids such an announcement. I am sure you would not desire or have me make such an announcement. And I am equally sure that my son would not care to have an appointment under such circumstances." Harlan would retire

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55. *Ibid.*

56. Letter From Roosevelt to Justice Harlan, June 28, 1906, *id.* Moody knew of this plan. On July 26 he inquired of Taft whether the President had heard from Harlan, at the same time trusting that Taft would not misconstrue his interest.

when his own judgment told him what the public interest and his sense of duty required.<sup>57</sup>

And so there was to be only one seat open on the Supreme Court and Roosevelt was not to be spared what was becoming an increasingly difficult decision. His inclination to appoint Lurton remained steadfast during August. He reassured Taft of his position and wrote to Root in South America that on advice of Day and Taft he had virtually decided on Lurton.<sup>58</sup> After consultation with Moody, he also nominated James Harlan to the Interstate Commerce Commission (an acknowledgment that his bluff had failed), at the same time discussing with him Lurton's successor in the Sixth Circuit.<sup>59</sup> By the end of the month the business seemed concluded and Moody prepared to leave the public service.<sup>60</sup>

Although disinterested from the personal standpoint, Moody did not take the President's decision docilely. He was distressed that the seat was going to a Democrat from the over-represented Sixth Circuit, and he made known his objection to Roosevelt, Taft, and Lodge. He had told the President how strongly he felt on August 17, in a visit to Oyster Bay, the day the decision had been made to appoint Harlan to the ICC. On the 27th, the same day that he asked the President as to the appropriate time for leaving the Cabinet, he had written "after a great deal of hesitation" to Taft, about the Brown vacancy. After expressing his regret that Taft would not go on the Court he proceeded to spell out his own position:

The President, as you know, at present intends to appoint Lurton. I know you and Judge Day approve the appointment and but for the fact that he is a Democrat, I think no better appointment could be made. But what will be the situation in case, by death or retirement, another opportunity comes to the President to appoint? The Sixth Circuit will then have Harlan, Day and Lurton. I do not believe in regarding circuit lines absolutely but will there not be difficulty in placing four out of the nine Justices in one of the nine circuits, leaving the third still without representation and in case the Chief Justice should make a vacancy, leaving the tremendously important seventh circuit without representation. I think selfishly, if for no other reason, you ought to take the situation into account. Is there not

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57. Letter From Justice Harlan to Roosevelt, July 3, 1906, *id.*

58. Letter From Roosevelt to Root, Aug. 18, 1906, *id.*

59. Letter From Roosevelt to Taft, Aug. 17, 1906, *id.*

60. On August 27, Moody wrote from Boston to the President: "I think I ought to ask you when you think it will be agreeable and convenient for a public announcement to be made of the time when I am to leave the Cabinet." Roosevelt preferred that he wait until after the election lest people conclude that he was "kicking" him out, or that Moody was dissatisfied with the President's anti-trust policies. He suspected that the *Boston Herald* would take one if not both of these positions. Roosevelt then added: "Lord, how I hate to have you go." Letter From Roosevelt to Moody, Aug. 28, 1906. *Ibid.*



some one in the second, third or seventh circuit who could be selected for this place?<sup>61</sup>

Taft's answer was that Lurton would not be regarded as an appointment from the Sixth Circuit, but as an appointment of a Southern Democrat.<sup>62</sup> Disturbed that Moody's objection to Lurton might change the President's mind he also wrote to Roosevelt. Enclosing Moody's letter he insisted that he had fully considered the question of the circuits before recommending Lurton. He also included the interesting item that he was "pleasantly surprised today to have a call from Judge and Mrs. Lurton, who have been taking a St. Lawrence trip, and have stopped over here for two or three days."<sup>63</sup>

The next significant step involves Moody and Lodge. Moody was in Boston on the first of September preparing the platform for the Republican state convention. He met with Lodge and presented his case against Lurton. Lodge, even more upset that a Democrat and an ex-Confederate at that, was to be elevated to the Supreme Court by a Republican President, immediately protested to his friend Theodore. The intensity of both men's opposition to Lurton is reflected in Lodge's letters. Lodge went directly to the point; he had nothing against Lurton personally nor did he question his legal talents. His age was against him, and there was the matter of the Sixth Circuit. But neither of these reasons would have led him to say anything:

My objection is fundamental. I do not think you ought to appoint a Democrat to the Supreme Court. I think that when a party has carried the country and obtained control of the government that it is entitled to the appointments on the Supreme Court bench which are of such a permanent character and because the Supreme bench is necessarily called upon to decide questions of wide political bearing. To appoint members of the opposite party to some of the lower courts, to give them places on Commissions is very proper and I would be the last to object to it, but the Supreme Court stands apart and I do not think that any one but a Republican ought to be appointed by us.<sup>64</sup>

Lodge, of course, was in full agreement that the appointee should be a man who believed in the full extent of the interstate commerce power and who was in sympathy with Republican policies in domestic legislation and in the Philippines. "But surely," he admonished, "you can find a Republican particularly in some of the unrepresented circuits who has these qualifications."<sup>65</sup>

Lodge then broached the most fundamental point of all, the ap-

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61. Letter From Moody to Taft, Aug. 27, 1906, Roosevelt MSS.

62. Letter From Taft to William H. Moody, Aug. 30, 1906, *id.*

63. Letter From Taft to Roosevelt, Aug. 31, 1906, *id.*

64. Letter From Henry C. Lodge to Roosevelt, Sept. 1, 1906, *id.*

65. *Ibid.*

pointee's constitutional philosophy. Oddly enough, this was the first time the question had been raised, although it was more in the nature of a general suspicion of Democrats than a specific indictment of Lurton:

But that which is decisive with me and which I think more important than anything else in such an appointment is that any judge of the Supreme Court for whom we are responsible should be of the Nationalist and not of the separatist school, should be a Hamiltonian and not a Jeffersonian. It is a rare thing to find a Democrat who is at heart a Federalist and an old Whig like White and it is not a chance to be taken.<sup>66</sup>

Stressing again the partisan factor, Lodge went on to say that it was almost without precedent for a Democratic President to appoint a Republican to the Supreme Court and that the Democratic members of the present Court were merely holding on with the hope that a Democrat would be in office to appoint their successors.

He concluded with the strongest plea not to put a strict constructionist on the bench:

I am too profoundly Hamiltonian in my beliefs as to the fundamental questions of the Constitution to look with anything but regret upon the elevation to the Supreme Court of a strict constructionist who inherits the separatist traditions. I would not trouble you about such a matter as this were it not that I felt so strongly about it.<sup>67</sup>

Lodge had struck the nerve center. Roosevelt forwarded the letter to Taft for his reaction. Taft was sure Lodge was wrong. "The truth is that the states rights business is largely passing away, and issues are now on a very different basis."<sup>68</sup> Temporarily reassured, Roosevelt told Lodge frankly that he and Moody were wrong. In a passage that has been frequently quoted, he went on to say that the *nominal* politics of a man were not important; his *real* politics were. As for Lurton, he repeated that:

He is right on the Negro question; he is right on the power of the Federal Government; he is right on the insular business; he is right about corporations; and he is right about labor. On every question that would come before the bench he has so far shown himself to be in much closer touch with the policies in which you and I believe than even White, because he has been right about corporations, where White has been wrong.<sup>69</sup>

Lodge was unmoved. He was appalled at the risk of appointing

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66. *Ibid.*

67. *Ibid.*

68. Letter From Taft to Roosevelt, Sept. 8, 1906, Roosevelt MSS.

69. Letter From Roosevelt to Lodge, Sept. 4, 1906. This letter is printed in 2 SELECTIONS 228-29.

a "separatist" to the Court. "The Republican," he wrote back, "like the Federalist and Whig, is by nature a liberal constructionist and the Democrat, is by nature, instinct, and training, the reverse."<sup>70</sup> Assuring the President he would not trouble him further, Lodge concluded by asking him directly to appoint Moody.

Of course you know my own high opinion of Moody and that I should have been very glad to see him appointed some years ago although at that time his public distinction might not have seemed to justify it. The eminence he has since attained as Attorney General certainly justifies it in the fullest degree if the locality objection is put aside. Nothing would give me greater pleasure than to see him on the bench.<sup>71</sup>

That Lodge had shaken Roosevelt somewhat, particularly on the point of constitutional philosophy, can be detected in the President's reply. He agreed absolutely with Lodge that a follower of Hamilton and Marshall and not of Jefferson and Calhoun was needed on the bench. "What is more," he added, "I do not want any man who from frivolity, or disinclination to think, or ignorance, or indifference to popular needs, goes wrong on great questions." He promised to see Taft and Day together as soon as he returned to Washington and go over most carefully with them the whole Lurton business.<sup>72</sup>

The first public inkling that the President might be shifting to Moody came on September 16. On this date the *New York Daily Tribune* carried a picture of Attorney-General Moody in his law office at 84 State Street, Boston, with the notation that rumors of the past week had Moody replacing Brown on the Court. Moody returned to Washington on the 24th. With the President, other members of the Cabinet, and the Court, returning around October 1, the stage would be set for the final act of the drama.

In the meantime Lurton was leaving no stone unturned to clinch his own appointment. Writing to Justice Day on September 25 he reported that Taft had told him confidentially that the President had made up his mind to appoint him, although party politics was still an obstacle. It was important to get Justice White to speak to the President. White was very anxious that the President ask for his opinion. "Having three or four months before been sent for and advised with he would not intrude the matter again upon the President, but believes the President will again send for him upon his

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70. Letter From Lodge to Roosevelt, Sept. 10, 1906, Roosevelt MSS.

71. *Ibid.* Moody had been Lodge's first choice at the time Holmes was appointed to the Court. See Letter From Lodge to Roosevelt, June 5, 1902, Roosevelt MSS; see also Garraty, *Holmes's Appointment to the U.S. Supreme Court*, 22 *NEW ENG. Q.* 293 (1949).

72. Letter From Roosevelt to Lodge, Sept. 12, 1906, Roosevelt MSS.

return to Washington. Suppose you suggest to the President that he confer with White."<sup>73</sup>

The President was back at the White House on October 1. He was anxious to talk with Taft, but the Secretary was in Cuba.<sup>74</sup> Filling the vacancy was now a matter of some urgency. The Court reconvened on the 7th and there were indications that it would postpone arguments in at least one important case until there was a full bench.<sup>75</sup> Meantime it was common newspaper talk that Lurton was to be appointed and the Judge, already in receipt of hundreds of premature congratulations and confident of the outcome, was anticipating his move to Washington.<sup>76</sup>

Events moved rapidly towards a denouement. Back from Cuba Taft sensed trouble for his candidate. He seemed to be preparing Lurton for the worst in a letter of October 19, marked extremely confidential. The partisan opposition which he had feared was developing and the President was in a state of doubt. Knox, he reported was pressing the claims of the Third Circuit in the person of Solicitor General Hoyt. Moreover, he informed Lurton, the President had received word that there would be opposition to him from his own party, specifically from Senators Carmack and Frazier of Tennessee. The matter was to be discussed further that night.<sup>77</sup>

In a series of crucial conferences over the next five days, the President finally reached his decision. Taft was with him on the night of the 19th, and on the 20th he consulted with Justices Day, Harlan and White. There is no written account of these conversations but Lurton himself got wind of a changing climate. Writing to Day on the 21st he claimed to have positive information that the appointment lay between Hoyt and himself. "Can you turn the scale," he asked. "If Judge White could be consulted it would be

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73. Letter From Lurton to Day, Sept. 25, 1906, Day MSS.

74. Roosevelt was impatient, writing to Taft in Cuba: "When do you get back? I wish to take up the Lurton matter with you in the presence of say Day, Root, and Moody." Roosevelt MSS.

75. This case involved a dispute between Kansas and Colorado over a diversion of the waters of the Arkansas River. Moody had filed a brief in this case arguing that the powers of the national government were so broad that in some instances it could act even without an implied grant in the constitution. The Court ultimately rejected the doctrine of "inherent powers," Moody not participating in the decision. See *Kansas v. Colorado*, 206 U.S. 46 (1907).

76. Lurton wrote to Day saying he was sorry the rumor had got out and at the same time asking: "Do you think from all you know that I would be reasonably safe in beginning certain preparations that will be essential if I am to make the change?" Letter From Lurton to Day, October 16, 1906, Day MSS. On the same day he wrote to Taft asking him to reconsider the Court, but if he intended to wait for a later opening, "I shall be glad if you can say *confidentially* to me that it is safe for me to begin to arrange my affairs." Letter From Lurton to Taft, Oct. 16, 1906, Taft MSS.

77. Letter From Taft to Lurton, Oct. 19, 1906, Taft MSS. The information as to the Tennessee Senators was erroneous. Both Carmack and Frazier endorsed Lurton.

wise."<sup>78</sup> But the latest developments made him doubt that he would have the pleasure of serving again with Day.

The real turning point came on October 22. On that day Moody received a confidential communication from E. A. Mosely, Secretary of the Interstate Commerce Commission. It was in answer to a request of the Attorney-General to investigate the decisions of Judge Lurton in cases involving the Commission. Mosely's reply was brief but conclusive:

Judge Lurton took part in the decision in the Geddes case (131 Fed. Rep. 453) which arose under the Safety Appliance Law. The other judges who sat in the case were Severens and Richards.

With one exception, Judge Lurton has decided against the contention of the Government *in every case* under the Interstate Commerce Law which has come before him.<sup>79</sup>

Moody forwarded this information to the President and the jig was up for Lurton. Despite Taft's unqualified confidence in his constitutional philosophy, the evidence was irrefutable that Lurton was decidedly not "right" on the "great" question of the national commerce power, at least by Roosevelt's standards. Thus Lurton's candidacy came to an abrupt ending.

All that remained was for the President to nominate another man. Root and Taft were with him until after mid-night on the 23rd. It may have been at this meeting that Roosevelt offered Root the seat and that Taft re-introduced the name of Lloyd Bowers.<sup>80</sup> But the decision to appoint Moody must have been concluded when the two left the White House. The following day Roosevelt again summoned Justices Day, White, and Harlan to the White House. Since the newspapers of that day carried the unofficial report, it is beyond doubt that he informed them of his reason for rejecting Lurton and of his intention to appoint Moody.<sup>81</sup>

There is no record of the exact time or circumstances in which Roosevelt offered the appointment to Moody. The story has come down on the basis of oral tradition and it would be characteristic,

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78. Letter From Lurton to Day, Oct. 21, 1906, Day MSS. He also wrote to Taft on the same day enclosing a letter of support from Senator Frazier and remarking: "If there is a man, woman or child, Republican or Democrat in Tennessee who would not be gratified I have yet to hear of him." Taft MSS.

79. Letter From E. A. Mosely to Moody, Oct. 22, 1906, Roosevelt MSS.

80. Root's biographer quotes him as saying in 1908 that he had been offered Brown's seat on the Court. See JESSUP, 2 ELIHU ROOT 126 (1938). No precise time is given and the correspondence does not reveal anything on this point. On the 26th Taft wrote to Bowers that some members of the Court advised against his appointment because of his relationship to the corporations. Letter From Taft to Bowers, Oct. 26, 1906, Taft MSS.

81. Washington Post, Oct. 24, 1906.

that he called in his Attorney General after eliminating Lurton. Moody had started to go through a list of other names when the President suddenly stopped him, grinned and said: "Is it possible you do not know whom I am to appoint to this position? You, and you only, are the man."<sup>82</sup>

The official announcement of Moody's nomination was made on November 7, the day after the off year elections. His name was submitted to the Senate on December 3 and he was confirmed after brief but spirited discussion, without a dissenting voice, on December 12.<sup>83</sup> On Monday, December 17, 1906, he took his seat next to Holmes in the charming old Court room as Mr. Justice Moody.

A sequel to the story concerns Judge Lurton. Taft broke the news as gently as possible, concealing the real reason for the President's action. Not a word was said about his decisions on the commerce clause. Taft attributed Roosevelt's change of heart to purely political considerations:

I think that the President has yielded to the view that his party would object to the appointment of a Democrat to succeed a Republican, making the Court four Democrats and five Republicans, because it would then be easy, in the case of the election of a Democratic President, at the next vacancy to give the Court a majority of Democrats. Harlan's statement, that in his view the Chief Justice would be glad to bring this about, perhaps had something to do with the President's conclusion.<sup>84</sup>

As a possible source of consolation Taft added that the President was still inclined to appoint him if a vacancy should occur among the Democrats. Lurton for his part lamented that "the dream of a lifetime is over."

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82. The story was repeated by Benjamin N. Johnson, a friend, who claimed to have it directly from Moody. See *PROCEEDINGS AT THE MEETING OF THE ESSEX BAR IN THE SUPREME JUDICIAL COURT IN MEMORY OF HONORABLE WILLIAM HENRY MOODY* (1919). See also Frank O. Lowden, *Memorial to Justice James H. Cartwright of the Illinois Supreme Court*, 314 Ill. 15 (1925), wherein he says that at this stage Moody recommended the appointments of Cartwright. The author is indebted to Wiener's thesis, *supra* note 51, for this reference.

83. Some Southern Senators, notably Senator Carmack of Tennessee and Senator Bacon of Georgia questioned Moody's attitude toward the South while a member of the House of Representatives. They discovered that he had introduced an anti-lynching bill and also had sponsored a resolution questioning the title of Southern representatives elected in states having a "grandfather clause." Moody responded through Senator Spooner saying he had introduced the anti-lynching bill at the request of a former Attorney-General of Massachusetts, but that doubtful of its constitutionality had not pressed it. As for the other resolution, he had acted because Louisiana's two senators themselves had earlier questioned the constitutionality of the "grandfather clause." Letter From Moody to Spooner, December 12, 1906. Spooner MSS, Library of Congress. See also Boston Herald, Dec. 12, 1906; Chicago Daily Tribune, Dec. 12, 1906.

84. Letter From Taft to Lurton, Oct. 26, 1906, Taft MSS.

I did hope that the President might stand up for a non-partisan appointment. That he was persuaded to think my appointment objectionable on that ground, I was distressed to learn. If he cannot risk me now, I do not see how the objection can ever grow less. . . . But it is over now and I wish to acknowledge most gratefully your loyal friendship under very embarrassing circumstances. "Blest be the tie that binds" is a sweet old hymn of the church. I may sing it in hearty approval of the closer tie which comes from long and intimate judicial association with those who from time to time have served on the Sixth Circuit Court of Appeals.<sup>85</sup>

The kindly Judge, of course, could not foresee the break in the clouds which would come in 1910 when Taft, as President, elevated him to the Supreme Court. This was 1906 and he was inconsolable.

Despite his tragically short tenure on the Supreme Court, Justice Moody measured up fully to the President's expectations. His work on the Court stamps him as a nationalist in the tradition of Hamilton and Marshall, and his opinions carry the stamp of a legal craftsman.<sup>86</sup> Indeed, many years later, Holmes would remark that his opinions merited praise of a degree rarely warranted by judicial writing.<sup>87</sup> And Felix Frankfurter, both judge and historian of the Court, has concluded that: "In the whole history of the Supreme Court of the United States there were only three Justices who left an impress despite a short tenure. William H. Moody of Massachusetts was one of them."<sup>88</sup>

Theodore Roosevelt had made the right selection, but the margin of error was thin. After all he nearly appointed a man who had sat on a federal court for thirteen years and decided against the federal regulatory power in every case save one. Moreover, in the teeth of repeated statements that a Justice of the Supreme Court had to be "right" on the great economic and social questions of the day, it is puzzling that the President delayed inquiring into Lurton's decisions until the matter came down to the wire. In asserting so positively to Lodge that Lurton was "right" in all of the crucial areas, he must have been relying completely and uncritically on Taft's word. Lodge prevailed over Taft but only because of the evidence and not on the basis of his personal relationship to the President.

Perhaps one cannot say absolutely that Lurton would have been appointed except for his decisions in cases involving the Interstate

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85. Letter From Lurton to Taft, Nov. 19, 1906, Taft MSS. Lurton wrote an almost identical letter to Day on November 21. Letter From Lurton to Day, Nov. 21, 1906, Day MSS.

86. See Moody's dissenting opinion in the *Employers' Liability Cases*, 207 U.S. 463 (1908), for his conception of the commerce power and also for his approach to statutory construction.

87. Letter From Holmes to Boyd Jones, March 22, 1919, Holmes MSS, Harvard Law School.

88. Letter From Felix Frankfurter to Paul T. Heffron, Dec. 27, 1961.

Commerce Commission. There were other factors; his party affiliation, the geographical problem, and even his age. Yet the weight of the evidence is compelling that the President's fear that Lurton's constitutional philosophy was incompatible with his own, was the main, if not the sole reason, for not going through with the appointment. That Lurton was a Democrat, sixty-two years old, and that the Sixth Circuit would be over-represented were more in the nature of reinforcing factors.<sup>89</sup>

Roosevelt would have appointed a nominal Democrat if his *real* politics had been right. The strong arguments of Lodge and Moody, men whose opinion he valued so highly, against appointing a member of the opposite political party, and from an over-represented circuit, to the nation's highest tribunal, did not seem to sway him.<sup>90</sup> Lurton was also acceptable to the Republican members of the Court itself, with the possible exception of a last minute hedging by Justice Harlan. Taft's statement to Lurton concerning the necessity of preserving the political balance on the Court is the only testimony that this factor was persuasive in the President's mind. But Taft offered this merely as a possible explanation and in a letter which was in essence a letter of condolence.

It is interesting to note that in the end Moody was the instrument of Lurton's elimination, if not of his own appointment. As Attorney-General he ordered an investigation of Lurton's judicial record. The question is intriguing but the evidence is lacking as to whether he did this on his own initiative or at the direction of the President. One can only surmise what his inner feelings must have been when he made his discovery and took the tidings to the President.

The human element can never be completely ruled out, but this writer is satisfied that essentially Moody's role was one of personal disinterest. He could not have been unaware of Roosevelt's interest in him and he knew of the plan to set up a second vacancy on the Court. Certainly he was interested in this possibility, but he did not expect to take Brown's seat even after Lurton was put out of the running. He was not privy to the conferences immediately leading up to the final decision and he assumed that the search for an available candidate was to be continued. It would not seem uncritical to conclude that his surprise was genuine.

In any case, as suggested at the outset, the event reveals the

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89. Justice Holmes was approximately the same age as Justice Lurton when appointed and it had not been an obstacle.

90. It has been suggested that Lodge's influence was responsible for Roosevelt's action. See Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 *MID WEST J. OF POL. SCI.* 39 (1959). But he does not consider the factor of Lurton's decisions.



complexities which may confront a President and the factors which influence him in the exercise of his appointing power. Whatever his backing and filling, Theodore Roosevelt's appointment of Moody to the Supreme Court represents a responsible use of that power in an area where the consequences are of great and lasting significance for the nation. His ability to consult, to listen, and to weigh, combined with an intuitive sense of caution before finally deciding, are the marks of a skillful Chief Executive. But one is tempted to repeat an off the bench statement once dropped by a Justice, that no man ever arrives at the Court save by considerable luck.